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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-932

CLYDE E. SKEEN, *Petitioner,*

vs.

VALLEY BANK OF NEVADA, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Nevada (Appendix to Petition, pp. A1-A4) is reported in 89 Nev. Adv. Op. 105, 511 P.2d 1053 (1973).

JURISDICTION

This Court does not have jurisdiction over this matter for the reason that all issues involving Federal questions were either not presented at all, or were not properly presented to the Nevada Supreme

Court. Thus, there is no Federal question raised by Petitioner that is reviewable by this Court.

STATEMENT OF CASE

Respondent adopts Petitioner's "Statement of the Case" with the following additions. After the failure of Petitioner to appear at the time set for the taking of his deposition, pursuant to a Notice to Take Deposition and the Stipulation of Counsel, Respondent, on April 25, 1972, filed a Motion to Strike Defendant's (Petitioner herein) Answer and for Judgment pursuant to Rule 37(d) of the Nevada Rules of Civil Procedure. Petitioner did not file any responding points and authorities, counter-affidavits or any documents whatsoever in opposition to said Motion and further, Petitioner did not request oral argument on Respondent's Motion to Strike. The Motion was submitted to The Honorable John W. Barrett, District Judge of the Second Judicial District, State of Nevada in and for the County of Washoe, on May 16, 1972, whereupon an order was entered striking Defendant's Answer and entering a Default Judgment against Defendant.

Petitioner timely appealed said Order and Default Judgment to the Nevada Supreme Court on the sole ground that the sanction was unduly harsh and constituted an abuse of discretion. Petitioner did not raise any issue regarding the constitutionality of Rule 37(d) of the Nevada Rules of Civil Procedure in his brief, nor was one argued in oral argument before the Nevada Supreme Court.

Petitioner thus had several opportunities to raise the issue of the unconstitutionality of Rule 37(d) of the Nevada Rules of Civil Procedure, but completely ignored this issue until ofter it was mentioned in passing by the Nevada Supreme Court in its Opinion in this action. Petitioner then, for the first time, raised the due process issue on a Petition for Rehearing before the Nevada Supreme Court.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I

NO FEDERAL QUESTION HAS BEEN PROPERLY OR TIMELY RAISED

Rule 19(a) of the Rules of the Supreme Court of the United States provides, in part, that a writ of certiorari may be granted, "(a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided in a way probably not in accord with applicable decisions of this court."

In the present case, the Nevada Supreme Court has not decided a Federal question of substance for the reason that no such question was properly before said Court. Petitioner admits that the issue was not raised until he filed a Petition for Rehearing before the Nevada Supreme Court. Nevada law specifically precludes the raising of new issues on a motion for rehearing. Rule 40 of the Nevada Rules of Appellate

Procedure sets forth the requirements for a petition for rehearing. Rule 40 provides, in part, as follows:

> "(C) SCOPE OF APPLICATIONS; WHEN REHEARING CONSIDERED.
>
> "(1) Matters presented in the briefs and oral arguments may not be reargued on petition for rehearing, and *no point may be raised for the first time on rehearing.*" (Emphasis added)

Thus, Petitioner's argument that Rule 37(d) of the Nevada Rules of Civil Procedure violates the Due Process clause of the United States Constitution was not properly before the Nevada Supreme Court and that Court, therefore, has not decided a Federal question of substance. This Court should not review an issue which was not properly before the lower court.

II

THE RESULT IN THE PRESENT CASE IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

Petitioner relies on three cases of this Court as the basis of his argument that Rule 37(d) of the Nevada Rules of Civil Procedure violates the Due Process clause of the Constitution of the United States, to wit: *Hovey v. Elliott,* 167 U.S. 409 (1897); *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909); *Societe Int'l v. Rogers,* 357 U.S. 197 (1958).

The *Hovey* case held that a Court could not strike an answer and enter a judgment against a party as

a punishment for failure to comply with a Court order. In the *Hammond* case, the holding of the *Hovey* case was "substantially modified" as stated by this Court in the *Societe Int'l* case; 357 U.S. 209. In *Hammond* this Court held that a state court could, consistently with the Due Process clause of the Fourteenth Amendment, strike the answer of, and render a default judgment against, a defendant who refused to produce documents in accordance with a pretrial order. The basis of the *Hammond* opinion is that a legislative body has the power to create a presumption that the refusal to produce material evidence is an admission of the lack of merit in the asserted defense. In the *Hammond* case, this Court stated the following:

> "The proceeding here taken may therefore find its sanction in the undoubtable right of the law making power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. . . . In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. . . . In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, . . ."
>
> 212 U.S. 350-351

Due process is preserved in the present case by the identical presumption which serves as a sanction for Rule 37(d) of the Nevada Rules of Civil Procedure which specifically provides for the striking of an answer and the rendering of a judgment by default against a party who fails to appear at the designated time and place for the taking of his deposition. No showing that the failure to appear was wilfull is required by Rule 37(d).

The *Societe Int'l* case does not require a finding of wilfullness before an answer can be stricken and a default judgment entered as a sanction for failure to comply with discovery rules. The *Societe Int'l* case holds that where there has been a finding that the failure to comply with the pretrial production order has been due to inability, despite good faith efforts to comply and not to wilfullness, bad faith or any fault of the party, then to enter a default against the noncomplying party is a violation of due process. The Court emphasized that the petitioner in the *Societe Int'l* case had made "extensive efforts at compliance." 357 U.S. 211. In so holding, the Court stated at page 212 the following:

> "In view of the *findings* in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of the complaint because of petitioner's noncompliance with a pretrial production order where it *has been established* that failure to comply has been due to *inability* and

not to wilfullness, bad faith or any fault of petitioner." (Emphasis added)

In the present case, there has been no finding of a good faith effort to comply nor any sort of showing that petitioner had any reason whatsoever for not appearing at the time and place designated for his deposition. The facts in the present case are more than sufficient to support the presumption of lack of merit as set forth in *Hammond*, and are further sufficient to support an implication of wilfullness. The Petitioner admitted the substantive allegations contained in the Complaint in this action in his Answer to Respondent's Request for Admissions. No reason whatsoever, at any time, has been offered by Petitioner for his failure to appear. Petitioner did not even file a response in opposition to Respondent's Motion to Strike. Further, Petitioner never contended in his brief to the Nevada Supreme Court that he had any reason for failure to appear or that for some reason he was unable to comply.

CONCLUSION

The *Societe Int'l* case did not hold, as contended by Petitioner, that it is necessary to show wilfullness in order for the sanction of default to be constitutional. *Societe Int'l* is authority only for the proposition that where there has been an affirmative showing and finding, establishing a good faith attempt to comply and a subsequent inability, then default is not a

proper sanction for failure to comply with discovery rules. In the present case, Petitioner's admission of the subsequent allegations of the Complaint, his failure to appear for the taking of his deposition, and the absence of any explanation therefore, the lack of opposition to the Motion to Strike Defendant's Answer and for Judgment, and the failure to raise the issue on appeal, are more than sufficient to invoke the presumption of lack of merit required by the *Hammond* case, and are indeed affirmative evidence of the wilfullness of his failure to comply with the discovery procedures. Thus, Due Process has been preserved.

Therefore, it is respectfully submitted that the present case is inappropriate for review by the Supreme Court of the United States.

Dated, Reno, Nevada,
January 15, 1974.

Respectfully submitted,
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